



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 9, 1995

Mr. Gregory J. Pfeifer  
Staff Attorney, Legal Services Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR95-1057

Dear Mr. Pfeifer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36034.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "all lists (including a list of all PRPs), indices, or summaries of files and/or documents" pertaining to three sites the requestor believes to be on the Federal Superfund/National Priorities list. The request also seeks lists, indices, or summaries of files and/or documents referring to the involvement of Exxon Corporation and Exxon Pipeline Company in these sites. You claim that the requested information is excepted from disclosure under sections 552.103(a), 552.107, and 552.111 of the Government Code. You have submitted samples of the documents requested. We have considered the exceptions you claimed and have reviewed the sample documents.

We begin by observing that pursuant to section 40.107(c)(4), (5) of the Natural Resources Code, the General Land Office, one of the commission's co-trustees, has adopted rules that affect the public's right to review certain information pertaining to the cleanup of pollution from oil spills. Generally, these rules require the state trustees to provide the public with an opportunity to review certain information and comment at certain stages in the process of assessing natural resource damage resulting from an oil spill. See 31 T.A.C. §§ 20.22(a)(1) (requiring trustees to provide opportunity for public review and comment on assessment plans, restoration plans, and settlement agreements), .36(b)(6), (e)(1) (requiring trustees to submit restoration project for public review and comment), .42(b) (requiring public review and comment of final settlement agreement

between trustees and responsible person), .44(b) (prohibiting trustees from executing any document which relieves responsible person from liability for natural resource damages until public has had opportunity to review and comment on document), .44(c) (requiring trustees to provide opportunity for public review and comment when trustees select assessment procedures and protocols for negotiated, expedited or comprehensive assessment, when restoration plan is proposed, and prior to certification of completion of restoration plan), .44(d) (requiring trustees to invite members of public to participate in development and design of equivalent resource plan, and allowing member of public to request hearing on said plan), .44(e) (permitting trustees to invite public to participate in determining whether assessment is necessary).

We believe that these rules control access to particular information pertaining to the subject sites that have been allegedly damaged by oil spills. The rules require, and in some cases permit, public review of certain information, including an equivalent resource plan, an assessment plan, a restoration plan, settlement agreements, restoration projects, and any document that relieves the responsible party from liability. The commission may not invoke a discretionary exception in the Open Records Act as authority to withhold such information from required public disclosure. We note that these rules do not apply to information related to sites allegedly contaminated by releases of other hazardous material.

As for the information for which the General Land Office's rules do not provide a right of public access, we will consider the exceptions you raise. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

The Governor of Texas has designated the commission as one of the trustees for the state's natural resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, and the Oil Spill Prevention and Response Act of 1991, Nat. Res. Code § 40.001 *et seq.*<sup>1</sup> As a trustee, the commission may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of hazardous material or oil. *See* Nat. Res. Code § 40.107. You have previously informed this office that once a natural resources damage assessment is undertaken by one of the trustees, it results in either a settlement with the potentially responsible parties or a lawsuit filed by the commission or,

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<sup>1</sup>The state trustees for natural resources also include the Texas Parks and Wildlife Department and the Texas General Land Office.

if federal litigation is already pending, the commission will join in that suit. Based on these facts, we conclude that the documents are related to settlement negotiations or reasonably anticipated litigation. Therefore, with the exception of (1) documents required to be disclosed pursuant to commission's rules, and (2) documents disclosed to all potentially responsible parties at each of the subject sites, the commission may withhold the requested documents under section 552.103(a). Open Records Decision Nos. 349 (1982) (when opposing party in litigation has seen or had access to information, no justification for withholding that information under § 552.103(a)), 320 (1982) (same). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As we have held that the commission may not withhold documents previously disclosed to all the potentially responsible parties at each of the subject sites, we must address your other claimed exceptions. We conclude that neither section 552.107 nor section 552.111 except the documents previously disclosed to the potentially responsible parties from disclosure. Open Records Decision Nos. 574 (1990) (Gov't Code § 552.107 does not apply to communications that are not confidential), 435 (1986) (Gov't Code § 552.111 waived by release of information to public). Therefore, the commission may not withhold documents previously disclosed to all of the potentially responsible parties at each of the subject sites.

In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Stacy E. Sallee".

Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

Ref.: ID# 36034

Enclosures: Submitted documents

cc: Mr. Alan K. Stazer  
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(w/o enclosures)